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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AL SONJA RICE, Plaintiff and Respondent, v. ROBERT A. YOHO et al., Defendants and Appellants.	B168464 (Los Angeles County Super. Ct. No. GC 030685)

APPEAL from an order of the Superior Court of Los Angeles County. Coleman A. Swart, Judge. Affirmed.

Zuetel & Torigian and Kenneth R. Zuetel, Jr., for Defendants and Appellants Robert A. Yoho and Robert A. Yoho M.D., Inc.

Gelfand and Gelfand, Robert E. Fisher and Gary B. Gelfand for Plaintiff and Respondent.

Defendants Robert Yoho, M. D. and his professional corporation (Yoho) appeal from an order denying their motion to compel arbitration of plaintiff Al Sonja Rice's medical malpractice case against Yoho. Such an order is appealable. (Code Civ. Proc., § 1294, subdivision (a); all further undesignated section references are to the Code of Civil Procedure.)

The parties signed a written arbitration agreement which included an express revocation clause permitting either party to rescind the agreement by giving written notice within 30 days of signing it. Rice complied with the rescission clause.

Yoho contends the trial court erred because the rescission clause is based on section 1295, subdivision (c). Yoho argues that clause is preempted by the Federal Arbitration Act (FAA) because the clause undermines the arbitrability of disputes. Rice responds that because the revocation clause was an express contract term, FAA preemption does not apply and courts should enforce the contract as written.

We agree with Rice, reject Yoho's contention, and affirm the order.

FACTS

Rice first consulted with Yoho on November 12, 2001. Rice and Yoho, a plastic surgeon, discussed a possible liposuction procedure Yoho would perform on Rice. Rice agreed to have Yoho perform the procedure.

Rice met with Yoho again on November 14, 2001. They discussed Yoho's doing additional procedures. Rice agreed, and Yoho performed the surgery on that day.

On both November 12 and 14, 2001, Rice and Yoho dated and signed identical "PHYSICIAN-PATIENT ARBITRATION AGREEMENT[S.]" As relevant, the agreements stated: "Article 1: **Agreement to Arbitrate**: It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by

law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

"Article 2: **All Claims Must Be Arbitrated**: It is the intention of the parties that this agreement shall cover all claims or controversies whether in tort, contract or otherwise, and shall bind all parties whose claims may arise out of or in any relation to treatment or services provided or not provided by the physician . . . . [¶] . . . . [¶] . . . .

"Article 4: **Revocation**: This agreement may be revoked by written notice delivered to the physician within 30 days of signature and i[f] not revoked will govern all medical services received by the patient. [¶] . . . ."

The Rice-Yoho contracts contained the following language just above the signature lines: "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

Rice believed Yoho negligently performed the surgery, injuring her. On December 11, 2001, Rice timely delivered a written revocation notice to Yoho. The notice stated: "We are exercising our option to revoke the physician-patient arbitration agreement as stipulated in Article 4 on the enclosed document."

Yoho concedes he timely received the notice and that it satisfied Article 4 of the parties' contract in all respects.

Rice filed her complaint in this case on November 5, 2002, alleging medical malpractice, professional negligence, unfair business practices, and fraud causes of action. Rice refused Yoho's request to stipulate to arbitration. Yoho's answer included an affirmative defense that the case should be arbitrated.

Yoho then sought an order compelling arbitration. Rice opposed the motion. The evidence disclosed that Yoho drafted the form arbitration agreement after consulting with lawyers. Yoho claimed the agreement included Article 4 to comply with section 1295, subdivision (c). Yoho also submitted evidence that he advertised his services nationwide and a substantial portion of his patients came from other states, demonstrating that his business engaged in interstate commerce.

The trial court denied Yoho's motion to compel arbitration, finding that Article 4, an express contract term in an integrated agreement, was not preempted by the FAA: ". . . Article 4 of the physician-patient arbitration agreement, although drawn from . . . [section] 1295[, subdivision] (c), [] is not based on a statute that would prevent or impede arbitration if not complied with. [¶] . . . [T]his is just part of the standard arbitration agreement, it was a right in the contract to reject it and [Rice] exercised her option."

DISCUSSION

Yoho contends that Article 4 was based on section 1295, subdivision (c).[1] Yoho argues that because that section applies only to medical malpractice arbitration

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1 As relevant, section 1295, subdivision (c) states: "Once signed, such a contract [to arbitrate disputes arising from providing medical services] governs all subsequent open-book account transactions for medical services for which the contract was signed *until or unless rescinded by written notice within 30 days of signature*. . . . ." (Italics added.)

Section 1295, subdivisions (a) and (b), require that medical service contracts providing for arbitration of disputes regarding professional negligence by the service provider contain a written explanation that the arbitration provision eliminates either party's right to file a lawsuit to litigate that dispute, other than limited judicial review of any arbitration award, and that the warning be printed in capital letters and bold type just before the contract's signature lines. Article 1 of the Rice-Yoho contract directly quotes the required language from subdivision (a) of section 1295. The warning just above the signature line in the Rice-Yoho contract complies with subdivision (b) of section 1295.

Unlike subdivisions (a) and (b), nothing in section 1295, subdivision (c) requires that the rescission option be expressly included in the contract, as it was in the Rice-Yoho contract.

Section 1295, subdivision (e) states: "Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section." As discussed more fully below, we reject Yoho's claim that subdivision (e) requires him to insert a revocation clause complying with subdivision (c) into the arbitration agreement.

agreements, it is a state statute limiting only arbitration agreements. As such, Yoho concludes it, and thus Article 4 of the agreement, is preempted by the FAA. As such, Yoho asks us to read Article 4 out of the agreement, and then enforce the remaining terms, compelling arbitration.

Rice responds that Article 4, an express term of the parties' written, integrated contract, must be enforced. Rice argues the FAA's primary purpose is to enforce parties' written arbitration contracts, and it never operates to check parties' express contract terms. Rice concludes that since Article 4's revocation clause is an express contract term, and not a condition interpreted into an ambiguous contract by a court through reference to a state statute, FAA preemption does not apply.

We agree with Rice, and reject Yoho's contention.

The parties correctly agree that we review their written contract de novo. We apply settled rules in interpreting a writing. (*Paralift, Inc.* v. *Superior Court* (1993) 23 Cal.App.4th 748, 754.) "'Where, as here, no conflicting parol evidence is introduced concerning the interpretation of the document, 'construction of the instrument is a question of law, and the appellate court will independently construe the writing. [Citation.]'" (*Ibid*.)

Likewise, "[w]hether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court." (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685, internal quotations and citations omitted.)

This case involves private, nonjudicial arbitration based on the parties' written agreement. "In cases involving private arbitration, '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and '"[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission."' [Citation.]" (*Moncharsh* v. *Heily & Blasé* (1992) 3 Cal.4th 1, 8-9.)

"In determining whether a matter is subject to arbitration, courts apply the presumption in favor of arbitration and generally invoke ordinary rules of contract interpretation. Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute. *However, there is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate*." (Italics added.) (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority*, *supra*, 107 Cal.App.4th at pp. 684-685, internal quotations and citations omitted.)

A written agreement must be interpreted to give effect to the parties' ascertainable and lawful mutual intent as it existed at the time. (Civ. Code, § 1636; *Ticor Title Ins. Co.* v. *Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.) If the agreement's language is clear, explicit, and not absurd, determination of the parties' mutual intent and contract interpretation is based on the agreement's language alone. (Civ. Code, §§ 1638, 1639; *Sass* v. *Hank* (1951) 108 Cal.App.2d 207, 211.)

If the agreement's language is ambiguous or uncertain, i.e., reasonably susceptible to more than one interpretation (*Moss Dev. Co.* v. *Geary* (1974) 41 Cal.App.3d 1, 9), "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649; *Medical Operations Management, Inc.* v. *National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 892.) However, this interpretation is objective, i.e., how a reasonable promisor would have believed the

promisee understood the terms. (*Ibid*.) The objective standard looks to words and conduct, not undisclosed intentions. (*Horacek* v. *Smith* (1948) 33 Cal.2d 186, 193-194.)

We interpret the whole of a written agreement together, "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Specifically, "'an interpretation which gives a reasonable, lawful, and effective meaning to *all* the terms is preferred to an interpretation which leaves *a part* unreasonable, unlawful, *or of no effect*.' [Citation.]" (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 690, p. 623, italics added.) Particular clauses are subordinate to the agreement's general intent. (Civ. Code, § 1650.) If clauses are repugnant, they must be "reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose" of the whole agreement. (Civ. Code, § 1652.)

The Rice-Yoho contract unambiguously contains an express rescission clause, which Rice unquestionably properly invoked. Yoho's argument requires us to read this express contract term out of the contract. Under Yoho's reading, a contract with a rescission clause would become a contract that could not be rescinded. However, Rice agreed to a contract including an express rescission clause. Such a clause unquestionably is a material and significant contract provision, on which the parties specifically and expressly agreed. Without Article 4, there was no meeting of the minds, no agreement, and thus no enforceable contract, including no agreement to arbitrate. Without Article 4, there is no contract Yoho can enforce.

Yoho claimed he included Article 4 because he and his lawyers thought it was required or desireable. As noted, nothing in section 1295, subdivision (c) requires that such a rescission clause be included in the contract. Section 1295, subdivision (e) does not require that a revocation clause complying with subdivision (c) be incorporated in the contract. Instead, subdivision (e) provides that if the drafter does include a revocation

clause, that clause provides a defense if the other party tries to void the contract by claiming it is unconscionable. Yoho chose to insert the clause, hoping Rice would not timely exercise it if she thought the surgery went badly, and then use its presence to prevent Rice from trying to void the contract. However, Rice agreed to a contract that expressly included such a right. Yoho did not communicate his intention not to comply with the revocation clause in the contract to Rice; in any event, Rice still was entitled to rely on the express rescission clause in Article 4. Thus, as a matter of contract law, Yoho's contention lacks merit.

However, Yoho claims the FAA preempts Article 4 in the Rice-Yoho contract, because Article 4 was based on section 1295, subdivision (c). FAA preemption prevents states from passing laws which have the effect, when applied by courts, of invalidating otherwise valid contracts to arbitrate disputes.[2] FAA preemption works to uphold valid arbitration contracts. While the FAA contains a presumption that agreements to arbitrate be enforced rather than invalidated, its primary purpose is to enforce the parties' agreement, even where, as here, that agreement contains an express clause permitting rescission. Here, Yoho is invoking FAA preemption not to enforce the parties' agreement over a state's attempt to abrogate it by law, but to invalidate an express term agreed to by the parties. We reject Yoho's attempt to turn FAA preemption on its head.

Section 2 of title 9 of the United States Code provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA], . . . due regard must be given to the federal policy favoring arbitration, and

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[2] FAA arbitration applies where at least one of the parties to the arbitration agreement is engaged in interstate commerce. We assume without deciding that Yoho was so engaged.

ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration. [¶] . . . *There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate*." (Italics added.) (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 475-476 [affirming a stay of arbitration until resolution of pending, related litigation pursuant to a California statute, and rejecting an argument that the statute was FAA-preempted].)

In *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-93, the court invalidated an arbitration agreement that, by its own terms, became operable only if both parties initialed the arbitration provisions, because one party did not do so. The court found the failure of one party to initial the arbitration agreement meant there was no enforceable agreement *because* the agreement stated that the arbitration provisions became operable only if both sides initialed them. The court refused to invoke other cases or a general preference for arbitration to enforce an agreement on terms contradicted by the agreement's express provisions.

The same principle applies here. None of the cases upon which Yoho relies enforced an arbitration agreement in the face of an express, properly invoked rescission provision in the agreement itself.

We need not and do not decide if the FAA would preempt section 1295, subdivision (c), in a situation where the contract did not contain any rescission provision, but one party tried to avoid arbitration by claiming its rescission pursuant to that section was compelled by law. We do not have that situation here. The trial court correctly enforced an express, properly invoked contract term by denying arbitration.

Yoho chose to include the revocation clause so that if Rice did not revoke within 30 days, Yoho could force her into arbitration if she later tried to revoke the contract claiming unconscionability. Yoho could have omitted the clause, not notifying Rice of a

30-day revocation period, but would have had to defend against a later unconscionability claim. Rice properly complied with and is entitled to rely on the parties' express contract terms.

DISPOSITION

We affirm the order denying arbitration and award Rice her costs on appeal. NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

MALLANO, J.